1997

R. Morgan Burkett v. PIVP Hotel Management Corporation, and All Persons Unknown Claiming Any Interest In The Property Described in the Complaint, and DOES 1-20, inclusive : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

R. MORGAN BURKETT, Plaintiff/Appellant, vs. PIVP HOTEL MANAGEMENT CORPORATION, and All Persons Unknown Claiming Any Interest In The Property Described In The Complaint, and DOES 1-20, inclusive, Defendant.	**REPLY BRIEF OF APPELLANT** Case No. ~~970144~~ 970567-CA 960905531CV

Appeal from a Judgment of the Third Judicial District of Salt Lake County, State of Utah,
The Honorable J. Dennis Frederick, District Judge

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INTRODUCTION

By its silence, Defendant/Appellee PIVP Hotel Management Corporation ("PIVP") has conceded that the Complaint contains allegations which, if proven, would entitle Plaintiff/Appellant R. Morgan Burkett ("Burkett") to relief. For this reason alone, this Court should reverse the Order of Dismissal. Moreover, PIVP's acknowledgment that the Complaint seeks relief (partition of real property) that is neither requested nor available in the California Action establishes that the Order of Dismissal cannot be affirmed on the basis of comity or under the Utah Arbitration Act. Finally, PIVP's admission that Burkett could not file a lis pendens against the Reston Hotel on the basis of the California Action establishes and that the trial court's order releasing the lis pendens violated Burkett's statutory rights and the public policy behind lis pendens.

Contrary to PIVP's insinuations, Burkett did not file this action in order to "litigate the same facts and issues in multiple forums" and has not "challenge[d] the state and federal public policies which favor arbitration agreements." See Brief of Appellee, pp. 2, 5. Rather, Burkett brought this action because Utah courts have exclusive jurisdiction over the real property in which Burkett claims an interest (the Reston Hotel), and because filing a lis pendens in Utah is Burkett's only means of protection from PIVP's attempt to sell or encumber the Reston Hotel without regard for Burkett's interest. Consequently, this action is proper regardless of whether Burkett's other rights related to the Employment Agreement are determined in another forum.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE ORDER OF DISMISSAL BECAUSE IT IS UNDISPUTED THAT THE COMPLAINT STATES ALLEGATIONS WHICH, IF PROVEN, WOULD ENTITLE BURKETT TO RELIEF.

By its silence on the issue, PIVP has conceded that Burkett would be entitled to judgment in his favor if he proved the allegations in the Complaint. See Brief of Appellee, pp. 6-14. Under Utah law, an order granting a motion to dismiss can be upheld "only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." Prows v. State, 822 P.2d 764, 766 (Utah 1991); see also Brittain v. State, 882 P.2d 666, 668 (Utah App. 1994) (a motion to dismiss is proper only where the plaintiff "would not be entitled to relief under the facts alleged or under any state of facts [he] could prove to support [his] claim"). Consequently, PIVP's admission entitles Burkett to reversal of the trial court's Order of Dismissal.

II. THIS COURT SHOULD REVERSE THE ORDER OF DISMISSAL BECAUSE THE PRINCIPLES OF COMITY DO NOT PERMIT DISMISSAL.

PIVP has failed to show a legal basis upon which this Court could affirm the Order of Dismissal under the principles of comity. Indeed, PIVP's failure to address the controlling precedent on this issue, Power Train, Inc. v. Stuver, 550 P.2d 1293, 1294 (Utah 1976), speaks volumes. PIVP's only attempt to buttress the Order of Dismissal based on comity is its argument that "California is the appropriate forum for this dispute." See Brief of Appellee, pp. 12-13. That argument relies upon the holding in Jackett v. Los Angeles Dep't of Water & Power, 771 P.2d 1074 (Utah App. 1994). The reasoning in Jackett, however, is irrelevant to the present case. In Jackett, there was no question that both California and Utah courts had jurisdiction to decide the case. See Jackett, 771 P.2d at 1075. Rather, the question was whether a Utah trial court had discretion under the principles of comity to apply California's two-year governmental immunity

statute of limitations to a tort action. Jackett, 771 P.2d at 1075. The Jackett court's conclusion that the trial court acted within its discretion was based in part on the analysis that the "fortuitous occurrence" of a helicopter crash in Utah did not give Utah a great interest in deciding the dispute. Id. at 1077.

In the present case, however, Utah's interest in this dispute is clear: Utah courts are the only tribunal with jurisdiction over the Reston Hotel, the real property at issue in Burkett's partition claim. California courts cannot deliver the remedy Burkett seeks. The contrast between the facts in this action and those presented in Jackett demonstrate why the Jackett court held that "[t]he decision to apply comity in a particular case if fact sensitive." Id. at 1075. The facts of the present case present the question whether the existence of a contract action in California permits the trial court to dismiss a Utah law suit concerning partition of Utah real property. The answer, supplied by the Utah Supreme Court, is: "[a] pending action in another state may be grounds for a stay of the proceedings but not for dismissal." Power Train, Inc., 550 P.2d at 1294 (emphasis added). Accordingly, the trial court erred by dismissing the Complaint on the basis of comity. This Court should reverse the trial court's Order of Dismissal.

III. THIS COURT SHOULD REVERSE THE ORDER OF DISMISSAL BECAUSE IT VIOLATES THE UTAH ARBITRATION ACT.

A. The Order of Dismissal Violates the Utah Arbitration Act's Mandatory Stay Requirement.

PIVP has failed to present legal authority refuting Burkett's argument that the Order of Dismissal violates the Utah Arbitration Act's mandatory stay provision. It remains undisputed that the Utah Arbitration Act mandates that "[a]n order to submit an agreement to arbitration stays any action or proceeding involving an issue subject to arbitration under the agreement."

Utah Code Ann. § 78-31a-4(3) (1996) (emphasis added)[1]. Although PIVP cites two cases decided under the Federal Arbitration Act for the proposition that dismissal is proper when arbitration is compelled (see Brief of Appellee, pp. 10-12), PIVP's reliance on those two cases is misplaced for two reasons. First, the Federal Arbitration Act does not contain a provision analogous to Utah's mandating a stay of an action when arbitration is ordered. See 9 U.S.C.A. § 3 (West 1970). Second, in both cases, the courts determined that "retaining jurisdiction and staying the action will serve no purpose." Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc., 636 F.Supp. 750, 757 (D. Puerto Rico 1986); Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992). Such a determination depends upon the facts presented by each case. The Utah Supreme Court has observed that "[t]he difference between a stay and a dismissal can be of great significance to plaintiffs." Power Train, Inc. v. Stuver, 550 P.2d 1293, 1294 (Utah 1976). Both the Sea-Land Services, Inc. and Alford cases involved only claims for money judgments. See Sea-Land Services, Inc., 636 F.Supp. at 751-52 (plaintiff sought monetary damages for breach of contract and tortious interference); Alford, 975 F.2d at 1162 (plaintiff sought monetary damages for employment discrimination.) In neither case, therefore, was the court's dimissal meaningful to the parties.

Unlike Sea-Land Services, Inc. and Alford, however, the facts of the present case demonstrate that the court's retention of jurisdiction would serve three very important purposes. It would ensure that Burkett receives the relief to which he is entitled, i.e. partition of the Reston Hotel if he prevails on the merits of his claims (regardless of the forum for that determination)[2], preserve the status quo, and provide notice via a lis pendens to potential purchasers of the Reston

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[1] It should be noted that the Employment Agreement provides that California law governs its interpretation. California law, like Utah law, mandates a stay of actions in which arbitration is compelled. See Cal. Civ. Proc. Code § 1281.4 (West 1982).

[2] See Mountain Plains Constructors v. Torrez, 785 P.2d 928 (Colo. 1990) (en banc) ("A stay of the proceedings preserves [plaintiff's] right to foreclose on its mechanic's lien if it prevails in arbitration").

Hotel that litigation is pending that could affect their rights in that property.[3] Therefore, the present case is much more analogous to Mountain Plains Constructors v. Torrez, 785 P.2d 928 (Colo. 1990) (en banc), where dismissal of the action action pending the arbitration would frustrate the plaintiff's remedies. In other words, the present case is one where "[t]he difference between a stay and a dismissal can be of great significance to plaintiffs." Power Train, Inc., 550 P.2d at 1294. Because no basis exists for this Court to follow the reasoning in Sea-Land Services, Inc. and Alford to conclude that dismissal is appropriate, this Court should reverse the Order of Dismissal.

B. The Order of Dismissal Violates the Utah Arbitration Act's Requirement that Only Parties to an Arbitration Agreement Can Be Forced to Arbitrate.

PIVP has failed to present legal authority refuting Burkett's argument that the Order of Dismissal violates the Utah Arbitration Act by forcing arbitration in the absence of an arbitration agreement executed by both parties.[4] Although PIVP purposely withheld its consent from the arbitration clause, PIVP argues that the contract between Burkett and Sterling gives PIVP the right to force Burkett to arbitrate. This Court should recognize this argument for what it is—an unpersuasive attempt by PIVP to have its cake and eat it, too—and preclude a non-party to an arbitration agreement from enforcing that provision.

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[3] It is undisputed that Burkett's right to file a lis pendens pursuant to Utah Code Ann. § 78-40-2 (1996) is determined by whether his action is dismissed or stayed. PIVP admits that Burkett could not file a lis pendens on the basis of the California Action. See Brief of Appellee, p. 14 n.7. The protection provided by a lis pendens in this case is more than theoretical -- PIVP admitted its intention to refinance or sell the hotel when attempting to persuade the trial court to release the lis pendens. (R. 346-61, 364-71).

[4] Similarly, PIVP does not dispute the well-established rule that arbitration can be compelled only between parties to an arbitration agreement. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). PIVP also does not dispute that the Utah Arbitration Act allows courts to compel arbitration only as to those issues that are "subject to arbitration under the agreement." Utah Code Ann. § 78-31a-4(3) (1996).

PIVP relies upon J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) for the proposition that a non-signatory can enforce an arbitration clause. See Brief of Appellee, p. 8. The J.J. Ryan case is clearly distinguishable because it does not concern an arbitration agreement signed by only one party. Rather, the parties in J.J. Ryan had entered into numerous agreements with one another, some of which contained arbitration agreements, and some of which did not. J.J. Ryan, 863 F.2d at 319. The trial court compelled arbitration as to all the parties' disputes due to its finding that the numerous contracts were so intertwined that the contracts lacking arbitration clauses "would be largely illusory" in the absence of those agreements that contained arbitration agreements. Id. at 319. The court also found that the agreements must be read in light of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which states that the public policy favoring arbitration applies "with special force in the field of international commerce." Id.

Unlike the situation in J.J. Ryan, the present case does not involve an arbitration agreement signed by both parties, and does not concern international agreements governed by treaties providing special treatment for arbitration provisions. The J.J. Ryan holding does not support PIVP's position that this Court should uphold an order compelling arbitration where the defendant chose not to consent to the arbitration provision it seeks to enforce. This Court should enforce the Utah Arbitration Act, as well as the established rule that arbitration can be compelled only between parties to an arbitration agreement, by reversing the Order of Dismissal.[5]

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[5] PIVP argues that Burkett "creatively" chose not to name Sterling as a defendant in order to avoid arbitration. See Brief of Appellee, p. 8. Nothing could be less creative than Burkett's decision to name only PIVP when the contractual provision that has been breached (section 8(a)) requires PIVP to grant Burkett an equity interest in certain real property, including the Reston Hotel. See Brief of Appellant, pp. 5-6. PIVP, not Sterling, is the owner of record of the Reston Hotel. It is interesting that PIVP accuses Burkett of bringing duplicitous claims but then criticizes Burkett for narrowly tailoring his Complaint to name only the necessary parties.

IV. THIS COURT SHOULD REVERSE THE ORDER OF DISMISSAL BECAUSE IT WAS ERROR TO CONVERT PIVP'S MOTION TO COMPEL INTO A MOTION FOR SUMMARY JUDGMENT.

PIVP argues that the judgment below should be upheld because the trial court had the authority to review matters outside the pleadings and because Burkett submitted materials outside the pleadings. See Brief of Appellee, pp.6-8. This argument is not germane to this appeal. Burkett has not asserted that the trial court lacked authority to review matters outside the pleadings. See Brief of Appellant, pp. 11-13. Rather, Burkett argues that the trial court erred by (1) converting a motion to dismiss, other than a Rule 12(b)(6) motion, into a motion for summary judgment, and (2) failing to allow Burkett a reasonable opportunity to submit material relevant to a motion for summary judgment. Id. PIVP has not responded to either argument.

It is undisputed that the trial court's conversion of the Motion to Compel into a motion for summary judgment occurred at the end of the hearing and in the absence of prior notice to Burkett. It is furthermore undisputed that, even if PIVP had moved under Rule 12(b)(6), Burkett would have been entitled to notice and the right to submit materials relevant to the summary judgment motion. See Rule 12(b)(6), Utah R. Civ. P (". . . all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56"). The fact that the parties submitted some material[6] does not mean that Burkett had the opportunity to submit materials relevant to a summary judgment.

The cases cited by PIVP do not support PIVP's position that the trial court's conversion was appropriate. In Rodriguez v. Fullerton Tires Corp., 115 F.3d 81 (1st Cir. 1997), the court found that the defendant was on notice of a possible conversion to summary judgment due to the fact that "[g]iven the specific language of Rule 12(b), the inclusion of [extraneous] materials with the motion put the nonmovant, Fullerton, squarely on notice that the court had the option of

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[6] Whether those materials were "outside the pleadings" is an interesting question since the documents Burkett submitted to the trial court were pleadings in the California Action.

treating the motion as one for summary judgment." Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 83 (1st Cir. 1997). Unlike the motion in Rodriguez, however, the motion in the present case was a Motion to Compel Arbitration, to Dismiss the Complaint, or in the Alternative, to Stay Proceedings. (R. 23-180). There is no basis for this Court to find that the parties' submission of extraneous materials pursuant to such a motion put Burkett on notice that he might have summary judgment entered against him at the conclusion of the hearing. In fact, the only "extraneous" materials Burkett submitted in opposition to the Motion to Compel concerned whether PIVP was a party to the arbitration agreement. Unlike a Rule 12(b)(6) motion, the Motion to Compel did not present the question whether Burkett had failed to state a claim upon which relief could be granted. In fact, PIVP does not dispute that Burkett has stated a cognizable claim for relief. See Point I, above. Burkett's inclusion of some material that is arguably outside the pleadings does not raise any inference that Burkett was provided the opportunity to introduce matters made relevant by the conversion to summary judgment. The issues involved in defending a motion to compel arbitration are not the same as those involved in defending a motion for summary judgment.[7] The Rodriguez holding does not provide any basis upon which this Court can affirm the trial court's conversion of the Motion to Compel into a motion for summary judgment. PIVP's reliance upon the holding of DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835 (Utah 1996) is similarly unavailing. In DOIT, Inc., the Utah Supreme Court, not the trial court, treated a Rule 12(b)(6) motion as a motion for summary judgment pursuant to Rule 56. DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 838-39 n.3 (Utah 1996). In doing so, the Utah Supreme Court found that none of the parties was prejudiced by that conversion. Id. There was no

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[7] PIVP's argument is especially troublesome due to its logical conclusion. If any type of motion to dismiss, e.g. one sought as a sanction for discovery abuses, can be converted at a trial court's whim into a motion for summary judgment, then parties will need to present all of their evidence on the merits of their case in order to protect against as order awarding summary judgment.

indication in DOIT, Inc. that the losing party would have submitted different information if it had been on notice of the conversion. Unlike the situation in DOIT, Inc., the circumstances of the dismissal in the present case demonstrate that Burkett was prejudiced by the trial court's sudden conversion of the Motion to Compel into a motion for summary judgment, and that Burkett would have submitted different information had be been notified in advance of that conversion. Accordingly, the DOIT, Inc. case provides no support for PIVP's argument that the conversion was proper.

No basis exists upon which this Court could affirm the trial court's conversion of the Motion to Compel into a motion for summary judgment, or the trial court's failure to allow Burkett a reasonable opportunity to submit material relevant to a motion for summary judgment.[8] Not only was the conversion without legal basis, but also Burkett was not on notice that such a conversion could occur. Accordingly, this Court should reverse the Order of Dismissal.

V. THE TRIAL COURT'S ORDER RELEASING THE LIS PENDENS VIOLATES MR. BURKETT'S STATUTORY RIGHTS AND THE PUBLIC POLICY BEHIND LIS PENDENS.

PIVP has failed to present any reason for this Court to affirm the trial court's order to release the lis pendens. See Brief of Appellee, p. 14. Rather, PIVP relies upon the purely circular argument that, since no litigation was pending after the court's Order of Dismissal, the court acted appropriately by ordering the Lis Pendens released. Id. This argument fails for three reasons. First, it ignores the fact that this litigation did not end with the trial court's order dismissing the aciton. Burkett filed his Notice of Appeal the same day that the Order of Dismissal was entered, March 11, 1997. (R. 378-84, 386-88). Second, PIVP's argument ignores the fact

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[8] It is disingenuous for PIVP to argue that this Court should not review this issue because Burkett did not raise the issue before the trial court. (See Brief of Appellee, p. 6 n.1.) It is clear from the record that Burkett had no opportunity to make any objection to the trial court's "conversion" as it was first mentioned in the trial court's ruling on the Motion to Compel.

that Burkett informed the trial court of his intention to appeal the trial court's ruling well before the court entered its order to release the lis pendens. Third, the argument ignores the fact that Burkett's statutory right to file a lis pendens is an important substantive right designed not only to protect Burkett's interest and assure his remedy, but also to provide notice to potential purchasers of claims against property. See Brief of Appellant, pp. 14-15. PIVP's argument therefore cannot support an affirmance of the order to release the lis pendens. Furthermore, the fact that the trial court knew when it entered the order that PIVP intended to encumber the property[9] makes the order particularly egregious. This Court should reverse the order to release the lis pendens.

CONCLUSION

The Order of Dismissal violated the established standard for granting motions to dismiss, the principles of comity, the Utah Arbitration Act, and the policy behind the lis pendens statute. In doing so, it cut off Burkett's ability to protect his property interest and to provide notice to others of the litigation concerning the ownership of the Reston Hotel. For these reasons, Burkett respectfully requests that this Court reverse the Order of Dismissal and allow the filing of a lis pendens against the Reston Hotel.

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[9] PIVP expressly admitted such intention to the trial court prior to the entry of the Order of Dismissal. (R. 346-61, 364-71.)

Dated this 29th day of September, 1997.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 1997, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT, to:

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